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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

THE UNITED STATES OF AMERICA, PETITIONER

v.

C. O. MASON, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The Solicitor General, on behalf of the United States, prays that a writ of certioriri issue to review the judgment of the United States Court of Customs and Patent Appeals entered in these cases on June 18, 1964.

OPINIONS BELOW

The opinions of the Customs Court are reported at 49 Cust. Ct. 89, 129, 132 and 135. The opinion of the Court of Customs and Patent Appeals (App. 1a) is reported at C.A.D. 844.[1]

[1] In the Customs Court, this litigation involved four separate cases, with four majority opinions being written. Consequently, four appeals, with four separate printed records, were prosecuted to the Court of Customs and Patent Appeals. They were *United States* v. *C. O. Mason, Inc.* (Customs Appeal No. 5130); *United States* v. *Bordas & Company* (Customs Appeal No. 5133); *United States* v. *Guillermo Arbona Coll, Inc.* (Cus-

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on June 18, 1964 (App. 11a). By an order of the Chief Justice, dated September 15, 1964, the time for filing a petition for a writ of certiorari was extended to and including November 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether Section 514 of the Tariff Act of 1930, 19 U.S.C. 1514, providing that any protest of a tariff determination ("liquidation") by the Collector of Customs shall be filed within sixty days after the liquidation, is applicable to protests asserting that the liquidation was based upon an unconstitutional statute.

STATUTES INVOLVED

1. Section 505 of the Tariff Act of 1930, 46 Stat. 732, 19 U.S.C. 1505, provides:

> The consignee shall deposit with the collector, at the time of making entry, unless the mer-

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toms Appeal No. 5134); and *United States* v. *Pan American Standard Brands, Inc., Geo. Sanders & Co., Inc.* (Customs Appeal No. 5135). However, the Court of Customs and Patent Appeals considered the cases as one and rendered a single opinion. For this reason, and because the facts and issues are identical, we are filing a single petition for certiorari encompassing all four cases.

"R." references in this petition are to the four printed records in the Court of Customs and Patent Appeals. *E.g.*, "R. Mason" refers to the printed record below in *United States* v. *C. O. Mason, Inc.* (Customs Appeal No. 5130).

"*App.*" references are to the appendix to this petition, *infra*, pp. 1a–11a.

chandise is entered for warehouse or transportation, or under bond, the amount of duty estimated to be payable thereon. Upon receipt of the appraiser's report and of the various reports of landing, weight, gauge, or measurement the collector shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise as provided by law and shall give notice of such liquidation in the form and manner prescribed by the Secretary of the Treasury, and collect any increased or additional duties due or refund any excess of duties deposited as determined on such liquidation.

2. Section 514 of the Tariff Act of 1930, 46 Stat. 734, 19 U.S.C. 1514, provides:

> Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury) * * * under any provision of the customs laws, and his liquidation or reliquidation of any entry, * * * shall, upon the expiration of sixty days after the date of such liquidation * * * be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction * * * shall, within sixty days after, but not before such liquidation * * * file a protest in writing with the collector setting

> forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. * * *

3. Section 515 of the Tariff Act of 1930, 46 Stat. 734, 19 U.S.C. 1515, provides:

> Upon the filing of such protest the collector shall within ninety days thereafter review his decision, and may modify the same in whole or in part and thereafter remit or refund any duties * * *. If the collector shall, upon such review, affirm his original decision, * * * then the collector shall forthwith transmit the entry and the accompanying papers, and all the exhibits connected therewith, to the United States Customs Court for due assignment and determination, as provided by law. * * *

STATEMENT

Under Section 505 of the Tariff Act of 1930, 19 U.S.C. 1505, *supra*, p. 2, the consignee of imported merchandise is required to deposit with the Collector of Customs, at the time of entry, the amount of duty which the Collector estimates is payable. Later, after receiving appraiser's and other reports, the Collector determines precisely the rate and amount of the duties owed. This is called "liquidating" the rate and amount of duties. He then gives the consignee notice of the liquidation and collects any additional duties due or refunds any excess which has been deposited.

Section 514 of the Act, 19 U.S.C. 1514, *supra*, p. 3, provides that this liquidation by the Collector "shall

upon the expiration of sixty days after the date of such liquidation, * * * be final and conclusive upon all persons * * *, unless the importer, consignee, or agent of the person paying such charge or exaction * * * shall, within sixty days after, but not before such liquidation * * * file a protest in writing with the collector * * *." Section 515, 19 U.S.C. 1515, *supra*, p. 4, goes on to provide that upon the filing of a protest, the Collector shall review his prior decision; if he affirms it, he is to transmit the entry and all exhibits to the Customs Court for a determination of the dispute by that court.

The merchandise involved in the instant litigation consists of ground coffee and raw coffee which was imported into San Juan, Puerto Rico, at various times between April, 1957, and December, 1959 (App. 3a). The Collector liquidated the entries of ground and raw coffee between June, 1957, and December, 1959, at 36 cents a pound and 30 cents a pound, respectively (App. 3a–4a), the rate set by the Puerto Rican Secretary of Agriculture under an attempted delegation of rate-setting power by the Legislature of Puerto Rico.[2] No protests were filed within sixty days after these liquidations (App. 4a).

On September 15, 1959, the Customs Court decided *Pan American Standard Brands, Inc.* v. *United States*, 43 Cust. Ct. 122, holding unconstitutional, as an unlawful delegation of power by the Puerto Rican

[2] Act No. 95, 13 L.P.R.A. 2201 (supp.). Section 1319 of Title 19, in turn, vests the Legislature of Puerto Rico with power to impose duties on coffee imported into Puerto Rico.

Legislature, the provision of Act. No. 95, which empowered the Puerto Rican Secretary of Agriculture and Commerce to raise or lower the duties on coffee.[3] Following that decision, respondents filed protests in the present cases asserting that the duties of 36 cents and 30 cents per pound on coffee were erroneous because based upon the statute held unconstitutional (R. Mason 7–8; R. Bordas 7–9; R. Coll. 7–9; R. Pan American 8–9). Each protest was filed after the expiration of the sixty-day period from the date of liquidation.

The United States moved to dismiss all of the protests as untimely. The Customs Court, with one judge dissenting, denied the government's motion, holding that because the Collector's liquidations were based upon an unconstitutional statute they were absolutely null and void, and that, therefore, there had been no liquidation to start the running of the sixty-day period of limitations (R. Mason 16–24).[4] It distinguished between "a liquidation which is legal, although erroneous and voidable as such, and one which is illegal and absolutely void" (R. Mason 21). The court entered a judgment dismissing the protests as premature and ordering the Collector to "liquidate the entries herein so that a timely

[3] The United States did not appeal from the decision because the Puerto Rican Government was at that time reviewing the matter of duties on coffee in contemplation of new legislation, and thus it did not then appear that the case would have any prospective importance.

[4] The principal opinion of the Customs Court was filed in *United States* v. *C. O. Mason, Inc.* The opinions in the other three cases merely referred to the Mason opinion.

protest may be filed against the liquidations if so desired" (R. Mason 26). On appeal, the Court of Customs and Patent Appeals affirmed, basically adopting the theory applied by the Customs Court.

REASONS FOR GRANTING THE WRIT

The decision below is, we believe, plainly wrong. It will operate to defeat, to a significant extent, the policies of repose which are embodied in the limitations period found in Section 514 of the Tariff Act. Even if it is not followed by other courts, the consequences in the Court of Customs and Patent Appeals will be to unsettle matters which, under the statute, have long since been finally disposed of and open the courts to an indeterminate amount of stale litigation. If followed by other courts, the decision below would have an even more serious impact on the course of litigation and administration under federal statutes.

1. Section 505 of the Tariff Act of 1930 requires an importer to pay the amount of duty determined by the Collector in his "liquidation." Section 515 establishes an administrative and judicial procedure for obtaining a refund of any amount erroneously collected. Section 514, an ordinary statute of limitations, is an integral part of the statutory procedure for review. It makes the "liquidation" final unless the importer initiates administrative and judicial review proceedings within sixty days by filing a protest with the Collector.

Sections 514 and 515 together provide the exclusive mode of review for all claims of erroneous liquidation

and overpayment of duties, whether the asserted error was slight or flagrant, factual or legal, within the general area of the collector's authority or plainly unauthorized. In each of these cases, review under Section 515 must be initiated by filing a protest with the Collector within sixty days of the liquidation. There is, we submit, no basis for a distinction where the erroneous ground of the Collector's determination is that he proceeded under an unconstitutional statute. If the Collector takes action under the purported authority of an unconstitutional statute, his action is simply unauthorized and erroneous. It is in no relevant way different from any other action erroneously taken in excess of statutory authority. Like any other error it can be reviewed, and corrected, only through the procedures and in compliance with the time limits of Sections 514 and 515.

The principles involved are identical to those applied in the many decisions holding that where the legislature prescribes a particular procedure for challenging the action of governmental officials or agencies that procedure must be followed, even where the challenge is upon constitutional grounds. *Bradley* v. *Richmond,* 227 U.S. 477, 485; *First Natl. Bank* v. *Weld County,* 264 U.S. 450; *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337, 342–346; *Yakus* v. *United States,* 321 U.S. 414, 434–435. Similarly, where Congress has provided a time limit as an integral part of a statutory procedure for the assertion of a class of claims, the Congressional determination must be accepted and followed even if a claim raises a constitutional issue. *Soriano* v. *United States,* 352 U.S. 270.

The Court of Customs and Patent Appeals, invoking the provision in Section 505 of the Tariff Act, *supra*, pp. 2–3, that the Collector shall "liquidate the rate and amount of duties to be paid on such merchandise as provided by law." reasoned that liquidations based upon an unconstitutional statute were not liquidations "as provided by law," and, that, therefore, there existed no such "liquidations" as would start running the period of limitations set forth in Section 514 of the Act (App. 9a). However, the same could be said of any erroneous liquidations by the Collector. For example, if the Collector based his decision on an inapplicable statutory provision, or if he misconstrued a statute or proclamation and thereby improperly classified the merchandise, or if he acted whimsically in choosing a rate, it could just as well be said that the liquidations were not "as provided by law." The very purpose of the right of action granted importers and consignees by Sections 514 and 515 of the Act is to give them an opportunity to test whether or not the Collector's liquidations are "as provided by law." [5]

[5] Both the Customs Court (R. Mason 21–22) and the Court of Customs and Patent Appeals (App. 7a) relied upon cases holding that where the notice of liquidation was not given, the statute of limitations would not begin to run. Obviously, these cases are not in point. Where the Collector commits a procedural error which prevents the importer or consignee from bringing a timely action, the government should not be able to take advantage of its own error by interposing the limitations defense. In such a case, the importer or consignee has not "slept" on his rights. But the principle of those cases has no application here, where the respondents had notice of the Collector's liquidations and chose to forego filing protests within the statutorily prescribed period.

The language of Section 514 of the Act confirms our view. That Section provides that "*all* decisions of the collector, *including the legality of all orders and findings entering into the same,* as to the rate and amount of duties chargeable, and as to *all* exactions of whatever character * * * and his liquidation or reliquidation of *any* entry * * * shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons" unless a protest is filed within sixty days after "such liquidation, reliquidation, decision, or refusal * * *." (Emphasis supplied.) No plainer language could be employed to indicate that *all* determinations of the Collector, regardless of their basis, are to be final and conclusive unless challenged within sixty days.

2. The decision below is inconsistent with well settled principles in the application of statutes of limitation. "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 314. This policy has nothing to do with the underlying merits of a claim. A claim may be stale, memories may have faded, witnesses may have disappeared, and evidence may have been lost, all to the same degree where a claim is based

upon the unconstitutionality of a statute as where it is based upon some other asserted error in the action giving rise to the claim.[6]

We know of no precedent for an exception to statutory limitations such as that created by the court below. What precedent there is is directly to the contrary. In *Kavanagh* v. *Noble,* 332 U.S. 535, a taxpayer filed a refund claim after the expiration of the applicable two-year limitations period, contending that the Collector of Internal Revenue had based his assessment upon a regulation that had been declared "void" two months previously in *Helvering* v. *Janney,* 311 U.S. 189. This Court held the action to be time-barred, saying (332 U.S. at 538–539):

> It may well be that the taxpayer's refund claim was prompted by this Court's decision in *Helvering* v. *Janney, supra,* which set aside the Treasury regulation upon which the deficiency assessment was based. * * * But assuming that the *Janney* decision makes clear that the taxpayer here made an overpayment, the loss which he now suffers from an application of § 322(b)(1) is a loss which is inherent in the application of any period of limitations. Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary.

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[6] The reference in the *Chase* case to evidence having been lost is particularly apt here. Some of the entries involved in the instant case have been destroyed in accordance with a governmental schedule of records control (App. 10a).

See, also, *Leffingwell* v. *Warren*, 2 Black 599, 604–606. Similarly, this Court has held that claims for damages under the "taking" clause of the Fifth Amendment must be filed within the prescribed period of limitations. See, *e.g.*, *Soriano* v. *United States*, 352 U.S. 270.

3. The decision below is of importance both in its immediate application to the customs, patent, and trademark cases within the jurisdiction of the Court of Customs and Patent Appeals and in the threat it poses as a precedent which may be applied to other federal statutes by other courts.

While decisions holding tariff statutes unconstitutional are rare, four Presidential Proclamations setting duties have been declared "void" in recent years.[7] On the basis of the holding in the instant case, protests that would otherwise be untimely have recently been filed with respect to merchandise covered by one of those proclamations.[8] It is anticipated that, if the

[7] Presidential Proclamation No. 3211 (T.D. 54493), setting duties upon clothespins, was held void in *Falcon Sales Co., et al.* v. *United States*, 47 Cust. Ct. 129; Presidential Proclamation 3108 (T.D. 53883), establishing duties on bicycles, was declared void in *United States* v. *Schmidt Pritchard & Co., et al.*, 47 CCPA 152; Presidential Proclamation 3084 (T.D. 53755), on shelled peanuts, was held invalid in *United States* v. *The Best Foods, Inc.*, 47 CCPA 163; and Presidential Proclamation 3095 (T.D. 53808), also relating to peanuts, was declared invalid in *The Best Foods, Inc.* v. *United States*, 50 Cust. Ct. 94.

[8] *Cajo Trading, Inc.* v. *United States*, Protest 63/7627, involving untimely protests on clothespins. The Customs Court is withholding decision in that case pending the final resolution of the instant litigation.

decision below stands, other importers of merchandise subject to these proclamations will also attempt to take advantage of the holding below. The ground of the decision below would presumably be applied by the court to patent and trademark cases as well. Another unsettling aspect of the decision is that it opens the door to constitutional attacks upon countless tariff provisions which are not even currently operative and permits indefinite delay in challenging provisions now on the books.

Moreover, the significance of the principle announced by the court below obviously transcends customs litigation. Section 514 of the Tariff Act of 1930 is an ordinary statute of limitations, dating the period for bringing a claim based on the error of a government official or agency from the time of the official action. Reasoning identical to that adopted below could equally be asserted as the justification for entertaining otherwise time-barred suits under the Tucker Act, the Suits in Admiralty Act, and any number of other federal statutes granting a right of action to remedy the erroneous decision of a federal official or administrative agency. All that would be required would be a contention that the official or agency had acted on the basis of an unconstitutional statute or regulation.

CONCLUSION

In light of the importance of the question and the error inherent in the Court of Customs and Patent Appeals' decision, it is respectfully submitted that

this petition for a writ of certiorari should be granted and the decision below reversed.

ARCHIBALD COX,
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NOVEMBER 1964.

APPENDIX

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

October Term, 1963

Customs Appeal No. 5130

THE UNITED STATES, APPELLANT

v.

C. O. MASON, INC., APPELLEE

October Term, 1963

Customs Appeal No. 5133

THE UNITED STATES, APPELLANT

v.

BORDAS & COMPANY, APPELLEE

October Term, 1963

Customs Appeal No. 5134

THE UNITED STATES, APPELLANT

v.

GUILLERMO ARBONA COLL, INC., APPELLEE

October Term, 1963

Customs Appeal No. 5135

THE UNITED STATES, APPELLANT

v.

PAN AMERICAN STANDARD BRANDS, INC.,
GEO. SANDERS & CO., INC., APPELLEES

June 18, 1964

MARTIN, Judge.

These four appeals are from four judgments of the United States Customs Court, Third Division (C.D. 2364, C.D. 2373, C.D. 2372 and C.D. 2371), dismissing protests against the liquidations of the Collector of Customs at San Juan, Puerto Rico, assessing the duty on entries covering coffee imported into Puerto Rico, and ordering the collector at San Juan to liquidate the entries so that timely protests may be filled against the liquidations if so desired. The authority of the collector to liquidate derives from section 505 of the Tariff Act of 1930 which reads:

> The consignee shall deposit with the collector, at the time of making entry, unless the merchandise is entered for warehouse or transportation, or under bond, the amount of duty estimated to be payable thereon. Upon receipt of the appraiser's report and of the various reports of landing, weight, gauge, or measurement the collector shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise as provided by law and shall give notice of such liquidation in the form and manner prescribed by the Secretary of the Treasury, and collect any increased or additional duties due or refund any excess of duties deposited as determined on such liquidation.

The four cases were before the Customs Court on motions by the Government seeking dismissal of appellees' protests on the ground that the protests were filed after the expiration of the 60-day period prescribed in section 514 of the Tariff Act of 1930. Section 514 reads:

> Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, in-

cluding the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, *shall, upon the expiration of sixty days after the date of such liquidation,* reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), *unless the importer,* consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, *shall, within sixty days after, but not before such liquidation,* reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, *file a protest* in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation. [Emphasis ours.]

The merchandise involved was imported into San Juan between April 1957 and December 1959. It was assessed with duty at the rate of 36 cents a pound (roasted coffee and ground coffee) and 30 cents a pound (coffee preparation) under section 319 of the Tariff Act of 1930 and Act No. 4 of July 11,

1935 of the Legislature of Puerto Rico, as amended by Resolution of the Secretary of Agriculture and Commerce of Puerto Rico, approved by the Governor of the Commonwealth of Puerto Rico on April 18, 1957, under authority of Act No. 77, approved on May 5, 1931, as amended by Act No. 95 of June 21, 1955. The entries involved were liquidated between June 1957 and December 1959 and the protests were filed between March 1960 and November 1960, each of the involved protests being filed after the 60-day period provided for in section 514 had expired.

A common basis for appellees' protests was the decision of the Customs Court in *Pan American Standard Brands, Inc.*, v. *United States*, 43 Cust. Ct. 122, C.D. 2115, "basically made under date of 15 September 1959," which decision was made final "after a rehearing under date of 19 February 1960" and was not appealed. In *Pan American*, the Customs Court held unconstitutional, as an unlawful delegation of legislative power, the provision of Act No. 95 which empowered the Secretary of Agriculture and Commerce of Puerto Rico to modify, without any guidelines or standards, the rates of duty levied by Act No. 95. It also held invalid the resolution of the Puerto Rican Secretary of Agriculture and Commerce, issued under said statutory provision, and certain duty assessments on coffee imported into Puerto Rico made pursuant to said resolution. The duty rates struck down in *Pan American* represented an increase of 100 per centum over the lawful rates existing prior to April 18, 1957.

The Customs Court in all four cases before us dismissed the protests, not on the ground that they were filed too late, but, on the basis that they were prematurely filed.[1]

[1] The same judge in the Customs Court dissented from each of the four decisions and would have dismissed the protests on the ground that they were filed too late.

The Government argues that the Customs Court lacks jurisdiction over the protests as they were filed after the expiration of the 60-day period prescribed in section 514 of the Tariff Act of 1930. It urges that the majority opinion of the Customs Court failed to differentiate between cases involving (1) complete liquidations in which there has been compliance with all the procedural requirements of liquidation, and which must be challenged by timely protests; and (2) incomplete liquidations, which may be challenged on procedural grounds at any time prior to compliance with the necessary procedures. The Government contends that where the liquidation is found to be incomplete because the collector has not performed all the procedural acts required in liquidating the entries, there has actually been no final legal liquidation and, as a consequence, the protest is properly dismissed as premature and the collector is properly directed to complete the liquidation so that the importer may have an opportunity to question its legality by timely protest. The Government urges, on the other hand, that where a complete liquidation has been made in compliance with all the procedural requirements, as is alleged here, the question of the constitutionality of the statute under which the liquidation was made can be raised only by a timely protest.

Appellees and amicus curiae [2] urge that a liquidation incorporating a rate of duty which derives its only authority from an "unconstitutional statute" is "no liquidation" which will support a protest nor commence running the statute of limitations within the meaning of section 514.

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[2] The firm of Sharp & Bogan moved before this court for leave to appear as amicus curiae and to file a single brief in CA 5130, CA 5133, CA 5134 and CA 5135, which motion this court granted on August 26, 1963.

Appellee in CA 5133 further urges that the notices of liquidation involved in CA 5133 "were not posted" and that they should be considered "incomplete, invalid and void."

All four appeals present an identical dispositive issue: Whether protests against the collector's liquidations of duties between June 1957 and December 1959 under a provision of a statutory enactment subsequently ruled unconstitutional by the Customs Court in a decision which became final on February 19, 1960, will lie when the protests were filed more than 60 days [3] after the date the liquidations were made.[4]

The court below found that such protests will not lie since they were prematurely filed, and ordered the Collector of Customs at the Port of San Juan, Puerto Rico, to liquidate the entries "so that a timely protest may be filed against the liquidations if so desired." It proceeded on the theory that the provision

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[3] The records indicate the following:

	Liquidations made	*Protest filed*
CA 5130	June 1957–Sept. 1959	July 21, 1960
CA 5133	Jan.–Feb. 1958	Nov. 30, 1960
CA 5134	Aug.–Nov. 1957	Aug. 4, 1960
CA 5135	July–Dec. 1957 (4 entries)	June 22, 1960
	Aug. 1957–Dec. 1959 (63 entries)	March 25, 1960 (refiled July 15, 1960)

[4] Concerning the merits of the four cases, the Customs Court in CA 5130 referred to the following statement made by the Government's attorney:

"Mr. SKLAROFF: We can concede on the merits plaintiff has a case, in that the merchandise in issue is the same in all material respects to C.D. 2115, and if he gets over the hurdle of timeliness, we concede.

"Judge LAWRENCE: That in the opinion of the attorney for the defendant, the plaintiff is entitled to judgment provided the protest is timely?

"Mr. SKLAROFF: I have been so informed by the Chief Liquidator here, and the Customs officials here, with respect to all the other cases."

of Act No. 95 under which the liquidations were made, having been found unconstitutional, was not a law; that it was inoperative and afforded no basis for the alleged liquidations and subsequent protests; that its invalidity dates from the time of enactment; and that although in some situations, where a statute is declared to be unconstitutional, there may be a question of vested rights and of public policy which cannot be erased by a new judicial determination, no such factors have been presented in the cases at bar. We find no reversible error in those findings.

This court has held in *United States* v. *Astra Bentwood Furniture Co.*, 28 CCPA 205, C.A.D. 147, that a liquidation made under section 505 is void when the "notice of such liquidation" is not given "in the form and manner prescribed by the Secretary of the Treasury" and that such a liquidation, being not a final legal liquidation, is not within the bar of the statute of limitations under section 514. As a consequence a protest against such a liquidation, although filed after the 60 day period prescribed in section 514, is dismissible as being premature. In the *Astra* case it appeared from the record that neither the correct date of the involved entry nor the name of the importer were given on the bulletin notice of the liquidation of the involved entry, and that no notice was ever posted in conformity with the procedure for liquidation set forth in article 820(h) of the Customs Regulations of 1931. The protest was filed three years after the defective bulletin notice was posted, and five days after the Commissioner advised the collector that the request of the importer to post a notice of liquidation of the involved entry was denied. In that case, this court stated:

> In the instant case, it is clear that the provisions of article 820(h) have not been complied

> with. We are of opinion that as the collector failed to give the notice required by article 820(*h*), * * * the 60-day period after the liquidation within which the importer might protest, as provided in section 514, * * * has not commenced to run.

It further was unable to find any provision in section 514 which would warrant a holding that the 60-day period within which the importer might protest commenced to run on the date of the refusal of the collector to post the notice of his liquidation in the form and manner required by law, and concluded:

> We hold, therefore, that there has been no final legal liquidation of the involved entry against which, within the purview of section 514, * * * the importer may "within sixty days after, but not before such liquidation" file a protest; that the protest in the instant case is premature, and, therefore, untimely, and should have been dismissed by the trial court.
>
> In conclusion, we think it proper to say that it is the duty of the collector to complete his liquidation of the entry in the manner provided by law so that the importer, if it sees fit to do so, may protest the liquidation within the time prescribed by section 514, * * *.

The Government concedes that "procedural questions" such as the Government's failure to give a "complete" notice of liquidation as in the *Astra* case "may be raised at any time" prior to the collector's compliance with and completion of the proper liquidating procedures on the ground that there has been no final legal limitation of the involved entry to start the running of the statute of limitations within the purview of section 514. On the other hand, the Government contends that a liquidation which has been made in compliance with all procedural requirements of liquidation but which was based on a provision of

a statute subsequently held to be unconstitutional can be challenged only by a timely protest. We are unable to find any reasonable basis for that distinction. As with a liquidation involving "procedural questions," we think that a liquidation based on an unconstitutional provision of a statute is not a final legal liquidation to start the running of the statute of limitations within the purview of section 514.

Section 505, which authorizes liquidation, mandatorily requires the Collector of Customs to give notice of liquidations not only "in the form and manner prescribed by the Secretary of the Treasury" but also "as provided by law." We do not think that a liquidation made pursuant to a provision of a statute subsequently declared to be unconstitutional is a liquidation "as provided by law." As the Supreme Court stated in *Norton* v. *Shelby County,* 118 U.S. 425, 442 (1886):

> * * * An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

We further think that the language itself in section 514 indicates that Congress did not intend the 60-day requirement in section 514 to be completely controlling in every case. Thus section 514 requires that protests be filed within 60 days after a liquidation, *but not before* a liquidation.

What, then, is the proper case which Congress intended will stay the 60-day requirement? It seems to us that a liquidation based on an unconstitutional provision of a statute would certainly involve such a case since an unconstitutional provision of a statute is void *ab initio.*

We recognize that in some situations, when a statute is declared unconstitutional, there may be questions of vested rights and of public policy which cannot be erased by a new judicial determination.[5] However, we agree with the Customs Court that no such factors have been presented in the cases at bar.

We find no merit in the Government's contentions that if a liquidation based on an unconstitutional statute is to be opened by late protest, customs officials will be required to retain records and documents indefinitely and that this would be contrary to law.[6] We think Congress intended that administrative housekeeping regulations should bow to constitutional supremacy. Moreover, if liquidation records should be destroyed, we agree with the amicus curiae that the necessity for the plaintiff in every action raising the validity of a liquidation to establish the relevant facts by competent evidence would prevent any hardship on the Government. In *Olavarria & Co., Inc.* v. *United States,* 47 CCPA 65, C.A.D. 729, an importer contended that it was under no obligation to file protests because notices of liquidation were never given by the Government in the manner required by law. In that case there was no evidence relating specifically to the notices of liquidation of the merchandise, official papers having been destroyed as provided by law. This court, in finding for the Government stated that:

> It is, of course, presumed that public officials perform their duties in the manner required by law. *V. Mueller & Co.* v. *United States,* 28

[5] See Sutherland, Statutory Construction, § 111 (1964).

[6] The Government states that at least one or more of the involved entries was destroyed in accordance with the General Services Administrative Records Control Schedule, Bureau of Customs Comprehensive Schedule No. 2, Part VI, approved in House Report 2605, 83rd Congress, Second Session, August 3, 1954, as provided for in 44 U.S.C. 366–380.

> CCPA 249, C.A.D. 152; *United States* v. *Henry W. Peabody & Co.*, 40 CCPA 59, C.A.D. 498. It was therefore incumbent on the importer to show by competent evidence that notice of liquidation of the merchandise was not given in the manner required by the applicable statutes and regulations, * * *

It has been suggested by the Government that appellees' protests are barred by laches, although it is conceded that this defense was not raised at the trials below. When laches is not raised below, we do not think it is available on appeal. See *United States* v. *Webb*, 16 Ct. Cust. App. 156, T.D. 42790.

Therefore, we agree with the dismissal of the involved protests by the Customs Court for the reason that the protests have been prematurely filed, and consider that it is the collector's duty to assess duties against the involved entries and liquidate the same in the manner provided by law.[7]

The judgments of the Customs Court are *affirmed*.

AFFIRMED.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Thursday, June 18, 1964

(Caption omitted)

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

ORDERED that the judgments of the United States Customs Court be, and the same are hereby, affirmed.

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[7] Since we find that the Customs Court properly dismissed the protests as being premature on the ground that they were based on an unconstitutional provision of a statute, the question of the legality of the notices of liquidation in CA 5133 becomes moot.

U.S. GOVERNMENT PRINTING OFFICE: 1964